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# THE PRIVILEGE STOPS AT THE BORDER, EVEN IF A COMMUNICATION KEEPS GOING

Consequences of the Disparity Between U.S. and E.U. Treatment of  
Communications From In-House Attorneys After *Akzo-Nobel*

*David S. Jones*<sup>\*</sup>

## INTRODUCTION

Suppose that a South Carolina attorney provides solicited legal advice to a corporate client that operates in both South Carolina and the European Union. The practitioner may assume that the attorney-client privilege protects that communication. Is the attorney correct?

The answer may well be no, depending on where the question is asked. If the client employs the attorney as in-house counsel, then a court of the European Union would likely not honor the privilege. Indeed, in *Akzo Nobel Chemicals Ltd. v. European Commission*, the European Court of Justice mandates this result.<sup>1</sup> Conversely, a South Carolina court would likely uphold the privilege based on the evidentiary rules of the forum and the strong public policy in favor of the attorney-client privilege.<sup>2</sup> However, if the right conditions were in place, a court of this state could reasonably find that the attorney-client privilege did not attach.

This note seeks to educate South Carolina practitioners on the state of E.U.-level evidentiary privilege law and the possible implications for their practices involving clients operating under E.U. jurisdiction. Part I will discuss the development of E.U. privilege law through the European Court of Justice decision in *Akzo* and explore the weight and scope of that opinion. Part II will analyze the practical implications of this body of law for South Carolina attorneys in the context of cross-border communications from in-house attorneys and

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<sup>1</sup> Case C-550/07 P, *Akzo Nobel Chems. Ltd. v. Comm'n*, 2010 EUR-Lex CELEX 62007J0550 (E.C.J. Sept. 14, 2010), available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0550:EN:HTML> (last visited Mar. 24, 2012).

<sup>2</sup> See *State v. Love*, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980).

predict how a South Carolina court might address a challenge to an assertion of privilege over such a communication.

## I. CURRENT EUROPEAN-UNION PRIVILEGE LAW: NOT THE TYPICAL AMERICAN ATTORNEY-CLIENT PRIVILEGE

### A. *BACKGROUND: A BRIEF OVERVIEW OF E.U. STRUCTURAL FACTORS*

The European Union (E.U.) is a supra-national organization of independent European countries.<sup>3</sup> The E.U. is a continually evolving project, and is neither a loose treaty organization nor a centralized federation.<sup>4</sup> The E.U. government is composed of several institutions, including three major branches: the European Parliament, the European Commission, and the European Court of Justice.<sup>5</sup> While these three branches of government are separate, they are not equal in the American sense. The European Commission is the dominant force in E.U. government; the Commission exercises legislative, executive, and judicial powers.<sup>6</sup>

The International HR Journal has done an excellent job of describing the judicial relationship between the European Commission and the European Court of Justice:

The [European] Commission has investigative and enforcement powers over entities operating within the E.U. Once the Commission finds a violation, the entity's recourse is to have the Court of Justice review the Commission's decision.

The Court of Justice is the judicial branch of the E.U. It may review the Commission's procedures in imposing fines on an entity, but it cannot assume the role of a fact finder. Therefore, the only issues that an entity that has been fined by the Commission can

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<sup>3</sup> *Basic Information on the European Union*, EUROPA, [http://europa.eu/about-eu/basic-information/index\\_en.htm](http://europa.eu/about-eu/basic-information/index_en.htm) (last visited Mar. 11, 2012).

<sup>4</sup> *See The History of the European Union*, EUROPA, [http://europa.eu/about-eu/eu-history/index\\_en.htm](http://europa.eu/about-eu/eu-history/index_en.htm) (last visited Mar. 11, 2012).

<sup>5</sup> *EU Institutions and Other Bodies*, EUROPA, [http://europa.eu/about-eu/institutions-bodies/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/index_en.htm) (last visited Mar. 11, 2012).

<sup>6</sup> *See European Commission*, EUROPA, [http://europa.eu/about-eu/institutions-bodies/european-commission/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/european-commission/index_en.htm) (last visited Mar. 11, 2012).

bring before the Court of Justice are allegations that the Commission violated procedure in reaching its decision to impose the fine. The Court of Justice's decision is binding on all E.U. members and all entities operating within them.<sup>7</sup>

Another structural difference between the U.S. and the E.U. is the difference between the legal systems of the member states and the role of private litigants. With the exception of the United Kingdom, member states of the E.U. use a version of the civil law system.<sup>8</sup> Civil law systems do not employ the extensive discovery methods of common law systems.<sup>9</sup> Consequently, litigants in a civil law system must depend on public disclosures, and do not have the power to demand access to internal documents as in the U.S. Conversely, many civil law systems do not recognize any privilege over communications between in-house attorneys and the employing corporation.<sup>10</sup> This means that where an entity, such as a governmental agency, does have the power to demand access to internal documents, those communications are not protected.

*B. BACKGROUND: A BRIEF OVERVIEW OF THE ATTORNEY-CLIENT  
PRIVILEGE IN SOUTH CAROLINA*

Before focusing on evidentiary privilege law in the E.U., it may be helpful to review the American attorney-client privilege as a point of reference. The attorney-client privilege attaches to communications between an attorney and a client where it is "shown that the relationship between the parties was that of attorney and client and that

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<sup>7</sup> Publisher's Editorial Staff, *Operation of the Attorney-Client Privilege in the European Union*, 18 No. 3 Int'l HR J. Art. 4 n. 1 (2009).

<sup>8</sup> See D. A. O. Edward, *THE PROFESSIONAL SECRET, CONFIDENTIALITY AND LEGAL PROFESSIONAL PRIVILEGE IN THE NINE MEMBER STATES OF THE EUROPEAN COMMUNITY* 5-6 (1976), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/edward\\_enpdf1\\_1182334460.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/edward_enpdf1_1182334460.pdf); see also Council of the Bars and Law Societies of the European Union, *THE PROFESSIONAL SECRET, CONFIDENTIALITY AND LEGAL PROFESSIONAL PRIVILEGE IN EUROPE* 1-2 (2003), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/update\\_edwards\\_repor1\\_1182333982.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/update_edwards_repor1_1182333982.pdf) (updating the previous report by D. A. O. Edward).

<sup>9</sup> Francesca Giannoni-Crystal, *The EU Court's Decision in Akzo Nobel is Not a Big, Bad Wolf*, S.C. LAWYER, Jan. 2012, at 15, 17-18.

<sup>10</sup> *Id.* at 18.

the communications were of a confidential nature.”<sup>11</sup> In *State v. Love*, the Supreme Court of South Carolina reiterated that,

[t]his privilege is based upon a wise public policy that considers that the interests of society are best promoted by inviting the utmost confidence on the part of the client in disclosing his secrets to his professional advisor, under the pledge of the law that such confidence should not be abused by permitting disclosure of such communications.<sup>12</sup>

Corporations in South Carolina almost certainly enjoy the attorney-client privilege when communicating with their in-house counsel acting in their legal capacity. In the seminal decision on attorney-client privilege in the U.S., the Supreme Court, in *Upjohn v. United States*, affirmed that the policy underlying the attorney-client privilege supports extending it to corporations when consulting with their in-house counsel.<sup>13</sup> Although South Carolina has not yet ruled on this question directly, the state’s Supreme Court in *Ross v. Medical University of South Carolina* presumed that corporations enjoy the attorney-client privilege when communicating with their in-house counsel.<sup>14</sup> Given this law and the stated public policy favoring the attorney-client privilege, South Carolina attorneys (whether outside counsel or in-house) can operate safe in the knowledge that the legal advice that they provide to their domestic clients will be protected.

#### C. OVERVIEW OF CURRENT EUROPEAN UNION PRIVILEGE LAW.

The legal professional privilege is roughly the European continental equivalent of the attorney-client privilege of common law jurisdictions.<sup>15</sup> The scope and application of the legal professional privilege varies significantly from country to country.<sup>16</sup> In *Australian Mining & Smelting Europe Ltd. v. Commissioner*, (A.M. & S.) the European Court of Justice (ECJ) held that E.U. supra-national law did

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<sup>11</sup> *Love*, 275 S.C. at 59, 271 S.E.2d at 112 (citing 81 AM. JUR. 2D *Witnesses* § 221 (1980)).

<sup>12</sup> *Id.* (quoting S.C. State Highway Dep’t v. Booker, 260 S.C. 245, 254, 195 S.E.2d 615, 619-20 (1973); note that “Shall” is used in the original case, but the court in *State v. Love* uses “should”).

<sup>13</sup> *Upjohn v. United States*, 449 U.S. 383, 395, 101 S.Ct. 677, 685 (1981).

<sup>14</sup> *Ross v. Med. Univ. of S.C.*, 317 S.C. 377, 383, 453 S.E.2d 880, 884 (1994).

<sup>15</sup> See EDWARD, *supra* note 8; see also Council of the Bars and Law Societies of the European Union, *supra* note 8.

<sup>16</sup> *Id.*

recognize an evidentiary privilege. This professional legal privilege protects communications between attorneys and corporations.<sup>17</sup> *A.M. & S.* defined the privilege as protecting “the confidentiality of written communications between lawyer and client” where two requirements are met: first, “the communications are made [pursuant to] the client’s rights of defence [sic];” and second, the communications are with an independent lawyer.<sup>18</sup> Here, “independent” was defined to mean “not bound to the client by a relationship of employment.”<sup>19</sup>

The rule in *A.M. & S.* implied that companies operating within the E.U. do not retain the legal professional privilege with any person who is not a member of an E.U. member state bar or their in-house counsel in any area of E.U. regulation.<sup>20</sup> However, *A.M. & S.* did not address whether bar membership and contractual terms could put sufficient distance between an in-house attorney and the corporation such that the attorney was not “bound.”<sup>21</sup> Nearly thirty years later the ECJ answered these questions when it promulgated what is now the leading decision on legal professional privilege and in-house counsel: *Akzo Nobel Chemicals Ltd. v. European Commission*.<sup>22</sup>

*Akzo* affirmed the general view that in-house attorneys are dependent employees within the E.U. legal structure rather than independent attorneys.<sup>23</sup> Furthermore, the highly influential advisory opinion of the Advocate General in *Akzo*, the reasoning of which was adopted by the ECJ opinion, expressly rejected extending legal professional privilege to communications with practicing attorneys who were not members of an E.U. member state bar.<sup>24</sup> The decision does

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<sup>17</sup> Case 155/79 *Austl. Mining & Smelting Eur. Ltd. v. Comm’n*, 1982 E.C.R. 1575, ¶ 21.

<sup>18</sup> *Id.* The requirement of the relationship to the client’s “right of defense” is beyond the scope of this note and was not at issue in *Akzo Nobel*. The “right of defense” requirement functionally means that the legal professional privilege will apply in contexts that are more narrow than those in which the attorney-privilege will apply. This requirement might be compared to work “in anticipation of litigation.” See generally EDWARD, *supra* note 8; see also Council of the Bars and Law Societies of the European Union, *supra* note 8.

<sup>19</sup> *Id.*

<sup>20</sup> See *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Case C-550/07 P, *Akzo Nobel Chems. Ltd. v. Comm’n*, 2010 EUR-Lex CELEX 62007J0550 (E.C.J. Sept. 14, 2010).

<sup>23</sup> *Id.*

<sup>24</sup> Opinion of Att’y Gen. Kokott, Case C-550/07 P, *Akzo Nobel Chems. Ltd. v. Comm’n*, 2010 EUR-Lex CELEX 62007CC0550, ¶¶ 188-90 (Apr. 29,

not limit itself to competition regulation,<sup>25</sup> and it carries at least some weight as precedent for future cases.<sup>26</sup> Additionally, subsequent non-competition authority has relied upon *Akzo*. In *European Renewable Energies Federation ASBL v. European Commission*, a procedural case decided independent of competition law, the ECJ cited *Akzo* for its conception of in-house attorneys as dependent employees.<sup>27</sup> Furthermore, the statutory language interpreted in *Akzo* is not unique, and expansive application of the principles of *Akzo* is very possible where equivalent language appears in other statutes.<sup>28</sup> Also, given the structure of European regulation schemes, *Akzo*'s principles could easily be applied across the body of E.U. regulatory systems.<sup>29</sup>

#### D. THE AKZO DECISION AND ITS IMPLICATIONS

Taken together, ECJ jurisprudence holds that enterprises operating within the E.U. certainly do not enjoy legal professional privilege with their in-house counsel, at least in competition investigations, and probably not in any other regulatory area either. Additionally, enterprises may not enjoy legal professional privilege with an outside attorney who is not a member of an E.U. member state bar in the same areas.

##### 1. BACKGROUND TO *AKZO*: AUSTRALIAN MINING & SMELTING

The ECJ first considered the applicability of legal professional privilege in European Commission (Commission) competition investigations in *A.M. & S.*<sup>30</sup> The court in *A.M. & S.* considered a demand in the course of a Commission competition investigation for access to documents that Australian Mining & Smelting claimed were protected by legal professional privilege.<sup>31</sup> The Commission conducted the investigation under Article 14 of Council Regulation No. 17, which as then written, empowered the Commission to conduct "such

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2010), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007CC0550:EN:HTML> (last visited May 1, 2012).

<sup>25</sup> *Akzo*, Case C-550/07 P, ¶¶ 40-51.

<sup>26</sup> See discussion *infra* Part I.3.C.

<sup>27</sup> Case C-74/10, *European Renewable Energies Fed'n v. European Comm'n*, 2010 E.C.R. 00000, ¶¶ 52-53.

<sup>28</sup> *Akzo*, Case C-550/07 P, ¶ 2. For similar language in other statutes, see discussion *infra* Part I.4.

<sup>29</sup> See discussion *infra* Part I.4.

<sup>30</sup> Case 155/79 *Austl. Mining & Smelting Eur. Ltd. v. Comm'n*, 1982 E.C.R. 1575.

<sup>31</sup> *Id.* at ¶ 1.

investigations ‘as are necessary.’”<sup>32</sup> The Commission argued that its broad investigative powers under Article 14 superseded any nationally recognized legal professional privilege and entitled it to access the contested documents.<sup>33</sup> The ECJ rejected this argument, instead recognizing that there was a principle common to all member states protecting written communications pursuant to the right of defense between clients and “independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment.”<sup>34</sup> After the decision in *A.M. & S.*, it became apparent that the ECJ distinguished between in-house counsel and outside attorneys when determining the applicability of the legal professional privilege.

## 2. THE *AKZO* DECISION

Nearly thirty years after *A.M. & S.*, the ECJ revisited the question of legal professional privilege in competition investigations in *Akzo*.<sup>35</sup> In *Akzo*, the court considered whether legal professional privilege extended to, *inter alia*, emails between a general manager and an attorney in the company’s legal department that were seized in the course of a Commission competition investigation.<sup>36</sup> The attorney was enrolled as an *Advocaat* of the Netherlands bar, and Dutch national law accorded the protection of its legal professional privilege to the communications.<sup>37</sup> Nonetheless, the *Akzo* court held that legal professional privilege did not apply.<sup>38</sup> The ECJ affirmed that legal professional privilege applied only to “independent” attorneys, and reasoned that an attorney’s independence is determined both positively, by bar membership and concomitant responsibilities and disciplinary

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<sup>32</sup> *Id.* at ¶ 15, (quoting Commission Regulation 204/62, 1959-1962 O.J. SPEC. ED. 87.).

<sup>33</sup> *Id.* at ¶ 10.

<sup>34</sup> *Id.* at ¶ 21.

<sup>35</sup> Case C-550/07 P, *Akzo Nobel Chems. Ltd. v. Comm’n*, 2010 EUR-Lex CELEX 62007J0550 (E.C.J. Sept. 14, 2010).

<sup>36</sup> *Id.* ¶¶ 3, 8.

<sup>37</sup> *Id.* ¶¶ 8, 35-36; see JOHN FISH, REGULATED LEGAL PROFESSIONALS AND PROFESSIONAL PRIVILEGE WITHIN THE EUROPEAN UNION, THE EUROPEAN ECONOMIC AREA AND SWITZERLAND, AND CERTAIN OTHER EUROPEAN JURISDICTIONS 39-41 (2004), available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/fish\\_report\\_enpdf1\\_1184145269.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/fish_report_enpdf1_1184145269.pdf) (review of Dutch legal professional privilege between an in-house attorney and client corporation).

<sup>38</sup> *Akzo*, Case C-550/07 P, ¶ 122.



procedures; and negatively, by the absence of dependence upon the client.<sup>39</sup>

Under this rationale, the *Akzo* court held that in-house counsel could never be independent, even if they were admitted to a national bar, because they are salaried by their client corporations and intimately involved with their operations.<sup>40</sup> While *A.M. & S.* had implied this result,<sup>41</sup> the *Akzo* court judicially confirmed the presumption. Furthermore, although the *Akzo* court specifically interpreted E.U. competition Article 14 of Council Regulation No. 17,<sup>42</sup> the ECJ did not limit its decision to competition law only.<sup>43</sup>

Additionally, the advisory opinion of the Advocate General in *Akzo* suggests that legal professional privilege does not extend to practicing outside attorneys who are not members of an E.U. member state bar.<sup>44</sup> The Advocate General is a legal professional tasked with assessing the claims of the parties to a case before the ECJ, investigating the applicable law, and issuing an advisory opinion to the Court proposing a holding.<sup>45</sup> The Advocate General's opinion is non-binding but highly influential.<sup>46</sup> In her opinion in *Akzo*, Advocate General Kokott expressly rejected extending legal professional privilege to communications with practicing attorneys who were not members of an E.U. member state bar:<sup>47</sup>

[W]ith third countries there is, generally speaking, no adequate basis for the mutual recognition of legal qualifications and professional ethical obligations to

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<sup>39</sup> *Id.* ¶¶ 42-45.

<sup>40</sup> *Id.* ¶¶ 47-49.

<sup>41</sup> Case 155/79 *Austl. Mining & Smelting Eur. Ltd. v. Comm'n*, 1982 E.C.R. 1575.

<sup>42</sup> Commission Regulation 204/62, 1959-1962 O.J. SPEC. ED. 87, *amended* by Council Regulation 1/2003, 2003 O.J. (L 1) 1, 14.

<sup>43</sup> Case C-550/07 P, *Akzo Nobel Chems. Ltd. v. Comm'n*, 2010 EUR-Lex CELEX 62007J0550 (E.C.J. Sept. 14, 2010).

<sup>44</sup> Opinion of Att'y Gen. Kokott, Case C-550/07 P, *Akzo Nobel Chems. Ltd. v. Comm'n*, 2010 EUR-Lex CELEX 62007CC0550, ¶¶ 188-90 (Apr. 29, 2010).

<sup>45</sup> Protocol (No. 3) on the Statute of the Court of Justice of the European Union, art. 49, 2010 O.J. (C 83) 210.

<sup>46</sup> Pinset Masons, *Adidas Did Not Suffer Trade Mark Dilution*, Says Advocate General, OUT-LAW.COM (Jul. 16, 2003), <http://www.out-law.com/page-3731> ("The Advocate General's opinion is highly influential and usually followed by the Court.").

<sup>47</sup> Opinion of Att'y Gen. Kokott, *Akzo*, Case C-550/07 P, ¶¶ 189-90.

which lawyers are subject in the exercise of their profession. In many cases, it would not even be possible to ensure that the third country in question has a sufficiently established rule-of-law tradition which would enable lawyers to exercise their profession in the independent manner required and thus to perform their role as collaborators in the administration of justice.<sup>48</sup>

While the Advocate General's discussion focused on in-house attorneys, her opinion did not restrict the reasoning only to employed attorneys, and notes that legal professional privilege applies only where attorneys operate "as collaborators in the administration of justice."<sup>49</sup> The ECJ did not specifically address this point but did affirm Kokott's framing of the issues, her reasoning, and her results.<sup>50</sup> This implies, at a minimum, there is some question as to whether legal professional privilege would extend even to an outside attorney who is not a member of an E.U. member state bar, especially where the attorney's bar conceives of the attorney's role as more adversarial than that described in Advocate General Kokott's opinion in *Akzo*.<sup>51</sup>

Therefore, *Akzo* clearly allows the Commission in the course of a competition investigation to access all correspondence or other documents passing between an in-house attorney and the client corporation that are not made by or to outside counsel pursuant to the right of defense. Given that the opinion of AG Kokott expressly rejected extending legal professional privilege to communications with practicing attorneys who were not members of an E.U. member state bar,<sup>52</sup> the same might be true of communications passing between such outside attorneys and the client corporation. This is true even if identical correspondence with outside European counsel would be covered by legal professional privilege. Furthermore, because there

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<sup>48</sup> *Id.* ¶ 190.

<sup>49</sup> *Id.*

<sup>50</sup> Case C-550/07 P, *Akzo Nobel Chems. Ltd. v. Comm'n*, 2010 EUR-Lex CELEX 62007J0550 (E.C.J. Sept. 14, 2010).

<sup>51</sup> See *European Court of Justice Confirms That in-House Legal Advice Is Not Protected By Legal Privilege*, Corporate Legal Update, MAYER BROWN (Sept. 2010), <http://www.mayerbrown.com/london/article.asp?id=9638&nid=369> (concluding from this language that "it is clear that communications between clients and external counsel who are members of a bar or law society in a third country will, as is presently the case, not attract legal professional privilege").

<sup>52</sup> *Akzo*, Case C-550/07 P, ¶ 90.

was no language in *Akzo* limiting the decision to competition investigations, *Akzo* could be applied similarly in any other E.U. regulatory case. Thus, companies subject to E.U. law probably do not retain the legal professional privilege with their in-house counsel or attorneys who are not members of E.U. member state bars in any regulatory area.

3. PRECEDENTIAL VALUE OF ECJ DECISIONS: THERE'S ROOM FOR DEBATE, BUT THE ECJ EXPECTS ATTORNEYS TO PAY ATTENTION

The ECJ decision in *Akzo* carries at least some precedential weight for future jurisprudence.

ECJ decisions carry more precedential weight than decisions in continental civil-law systems while perhaps not quite as much as decisions in common-law systems.<sup>53</sup> At a minimum, ECJ decisions provide guidance as to the probable outcome of future cases.<sup>54</sup> Also, ECJ opinions cite to previous opinions of that court as support for its reasoning and holdings,<sup>55</sup> implying that the court sees its decisions as having weight for its own jurisprudence beyond the case under consideration.

Furthermore, the ECJ has indicated that it expects its decisions on E.U. law to be binding upon future cases of E.U. law before national courts.<sup>56</sup> *C.I.L.F.I.T. v Ministry of Health* considered whether the highest Italian court was required to submit a case to the European courts in order to comply with Italy's treaty obligations as a member of the European Community.<sup>57</sup> In *C.I.L.F.I.T.*, the Italian court believed that E.U. law clearly disposed of the issue, but one of the parties attempted to raise a question of interpretation of the law.<sup>58</sup> The ECJ held that a national court is not required to submit a case based upon E.U. law where the court "has established . . . that the [E.U.] provision in question has already been interpreted by the Court of Justice."<sup>59</sup> This suggests that the ECJ expects its decisions to have at least some precedential bearing on future cases.

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<sup>53</sup> See Richard L. Merpi II, Note, *The Lisbon Treaty and EU Treaty-Making Power: The Next Evolutionary Step and Its Effects on Member States and Third-Party Nations*, 56 WAYNE L. REV. 795, 800 n.42 (2010).

<sup>54</sup> *Id.*

<sup>55</sup> See *Akzo*, Case C-550/07 P.

<sup>56</sup> *C.I.L.F.I.T. v. Ministry of Health*, 1982 E.C.R. 3415, 3431-32 (authentic language Italian).

<sup>57</sup> *Id.* at 3418-19.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 3431-32.

E. *SUBSEQUENT NON-COMPETITION AUTHORITY RELYING UPON AKZO:  
BROAD APPLICATIONS MEAN BROAD IMPLICATIONS*

The holding in *Akzo* cannot be restricted to competition law alone, and even shortly after the decision the ECJ demonstrated that broad application of *Akzo*'s principles is both possible and logical. The ECJ extensively cited *Akzo* in *European Renewable Energies Federation ASBL v. European Commission (EREF)* for its conception of in-house attorneys as dependent employees.<sup>60</sup> Although the original actions arose out of state aid decisions (arguably resembling a competition case), *EREF* was a procedural case, and the opinion did not address competition law.<sup>61</sup> In *EREF*, the Federation brought two actions to annul Commission decisions. The Federation held that certain methods of national financing for the construction of nuclear power plants constituted improper state aid.<sup>62</sup> A lawyer who also served as director of the Federation brought the applications for annulment.<sup>63</sup> The General Court, however, rejected the application asserting that the lawyer was barred from representing EREF because the Federation employed her.<sup>64</sup> The General Court's premise was based on the procedural grounds; Article 19 of the Statute of the Court of Justice of the E.U. requires that parties be "represented" by a lawyer before European courts.<sup>65</sup> On appeal, the ECJ affirmed the lower court's holding that an attorney employed by a company could not practice before the European courts, and relied upon *A.M. & S.* and *Akzo* in its opinion dismissing the appeal:

[T]he requirement as to the position and status as an independent lawyer is based on a conception of the lawyer's role as collaborating in the administration of justice of the [E.U.]. . . . [*Akzo* held] that the requirement of independence of a lawyer implies that there must be no employment relationship between the lawyer and his client.<sup>66</sup>

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<sup>60</sup> Case C-74/10, *Eur'n Renewable Energies Fed'n v. Eur'n Comm'n*, 2010 E.C.R. 00000, ¶¶ 52-53.

<sup>61</sup> *Id.* ¶¶ 12-14, 16.

<sup>62</sup> *Id.* ¶¶ 1, 6.

<sup>63</sup> *Id.* ¶ 7.

<sup>64</sup> *Id.* ¶¶ 12-18 (citing 2010 O.J. (C 83) 210 at 214).

<sup>65</sup> *Id.*

<sup>66</sup> *Eur'n Renewable Energies Fed'n*, Case C-74/10, ¶¶ 52-53 (citing Case 155/79, *Austl. Mining & Smelting Eur. Ltd. v. Comm'n*, 1982 E.C.R. 1575, ¶ 24; Case C-550/07 P, *Akzo Nobel Chems. Ltd. v. Comm'n*, 2010 EUR-Lex CELEX 62007J0550, ¶ 42 (E.C.J. Sept. 14, 2010)).

Additionally, the opinion never addressed any issues of corporate personhood in connection with an attorney's status as a director of the enterprise, but instead focused on the attorney's status as an employee.<sup>67</sup> Stated simply, in *EREF*, the ECJ reiterated its support for the proposition that lawyers employed by corporations would not be treated as independent attorneys before European courts.<sup>68</sup>

Furthermore, *EREF* demonstrated that *Akzo*'s conception of in-house attorneys as dependent employees rather than independent attorneys is not confined to competition law, and presumably the same would apply by analogy to attorneys who are not members of an E.U. member state bar. This extension and reiteration of *Akzo* shows that the decision could easily serve as authority for the Commission to ignore an individual nation's recognized legal professional privilege between in-house counsel, foreign attorneys, and the client corporation in any regulatory area.

*F. ROOM FOR FURTHER EXPANSION: SIMILAR STATUTES AND LEGAL FRAMEWORKS PERMIT BROAD AKZO APPLICATION*

Further expansion of *Akzo* is also possible because the statutory clause interpreted in that case is not unique. The Commission could push to grant itself similar powers in any regulatory area. *Akzo* interpreted Article 14 of Council Regulation No. 17, which reads in relevant part: "In carrying out the duties assigned to it . . . , the Commission may undertake all necessary investigations into undertakings [i.e. businesses] and associations of undertakings."<sup>69</sup> *Akzo* clarified that this E.U.-level statutory grant of power to the Commission superseded nationally recognized legal professional privilege between attorneys and a client corporation where the attorneys were not outside counsel who were members of an E.U. member state bar.<sup>70</sup> A simple search of E.U. legislation on Eur-Lex for the term "all necessary investigations" reveals that E.U. law grants power to the Commission or national bodies to perform "all necessary investigations" in a mergers and acquisitions directive,<sup>71</sup> "Ecolabel"

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<sup>67</sup> *Id.* ¶¶ 49-51.

<sup>68</sup> *Id.* ¶¶ 52-53 (citing *Austl. Mining & Smelting Eur.*, Case 155/79, ¶ 24; *Akzo*, Case C-550/07 P, ¶ 42).

<sup>69</sup> Case C-550/07 P, *Akzo Nobel Chems. Ltd. v. Comm'n*, 2010 EUR-Lex CELEX 62007J0550, ¶ 2 (E.C.J. Sept. 14, 2010), *interpreting* 1962 O.J. (13) 204, *amended by* 2003 O.J. (L 1) 1 at 14.

<sup>70</sup> *Id.* ¶ 114-15.

<sup>71</sup> 2011 O.J. (L 110) 1 art. 10 ¶ 3.

environmental product labeling regulation,<sup>72</sup> air traffic control regulation,<sup>73</sup> and a veterinary check on imported products directive.<sup>74</sup> Additionally, other regulations that may not so directly empower the Commission still may be written in ways that permit overriding public interests to supersede confidentiality considerations.<sup>75</sup>

In light of these legislative grants, it appears that *Akzo* could be applied as authority for the proposition that the power to conduct “all necessary investigations” trumps nationally recognized legal professional privilege between a corporation and an in-house attorney under any of these legislative acts. While this note does not undertake a study of E.U. governmental institutions, expansion through similar grants of language seems especially possible given that the European Commission is the primary governmental organ charged with writing, proposing, interpreting, and enforcing E.U.-level legislation.<sup>76</sup> Thus, further extension of *Akzo* also is possible through interpretation of existing legislation.

Another possible area of application of *Akzo*’s principles in E.U. law might be corporate governance regulation. Under Directive 2006/46/EC (Directive), the E.U. directed its member states to accomplish several corporate governance goals.<sup>77</sup> As explained by the “Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States” (Study),

[n]ational corporate governance codes lay down rules or recommendations that are not mandatory, but with which companies must either comply, or explain deviations . . . . [The Directive] mandates the application of corporate governance codes by way of comply-or-explain – or alternatively allows the

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<sup>72</sup> 2010 O.J. (L 27) 1 art. 10 ¶ 3.

<sup>73</sup> 2008 O.J. (L 79) 1 art. 55 ¶ 1.

<sup>74</sup> 1998 O.J. (L 24) 9 art. 24 ¶ 1.

<sup>75</sup> Cf. Opinion of Att’y Gen. Kokott, Case C-524/09, *Ville de Lyon v. Caisse des Dépôts et Consignations*, CELEX 62009C0524, ¶ 98 (Oct. 14, 2010) (Comparing two potentially conflicting Directives: “the confidentiality of commercial information . . . may be outweighed only by overriding interests deserving protection.”).

<sup>76</sup> See *European Commission*, EUROPA, [http://europa.eu/about-eu/institutions-bodies/european-commission/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/european-commission/index_en.htm) (last visited May 1, 2012).

<sup>77</sup> 2006 O.J. (L 224) 1.

application of company-specific extra-legal principles.<sup>78</sup>

The Study indicated that internal control and risk management measures are generally regulated by national codes, which it characterized as being “regularly updated” and “flexible but also living instruments, which adapt to changing legal, economic, and social realities.”<sup>79</sup> This malleable framework allows member states the flexibility to permit sweeping investigative powers while aligning with general Directive principles. While it is unclear whether courts would treat such a national regulation written pursuant to an E.U.-level Directive in the same manner as a Commission regulation, in theory such a scheme could open the door for regulatory authorities to apply *Akzo* as supra-national authority<sup>80</sup> in seeking materials that otherwise would be protected by the legal professional privilege. Indeed, the ECJ most likely will consider this question eventually as E.U.-wide legislation and ECJ opinions become an increasingly significant part of the E.U. project as a whole, which is characterized as a “work in progress,”<sup>81</sup> with the courts having a reputation as being a driving force for unification.<sup>82</sup> Accordingly, corporate governance regulation is another potential area of *Akzo* application.

In summary, it should be clear that supra-national E.U. law does not attach evidentiary privileges to some communications that an American practitioner would expect to be covered by the attorney-client privilege. Also, questions remain as to whether the privilege attaches to any communications from attorneys licensed outside of the

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<sup>78</sup> RISK METRICS GROUP ET AL., STUDY ON MONITORING AND ENFORCEMENT PRACTICES IN CORPORATE GOVERNANCE IN THE MEMBER STATES 11 (2009), available at [http://ec.europa.eu/internal\\_market/company/docs/ecgforum/studies/comply-or-explain-090923\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/ecgforum/studies/comply-or-explain-090923_en.pdf) (comparing how member states implemented the Directive).

<sup>79</sup> *Id.*

<sup>80</sup> Case C-550/07 P, *Akzo Nobel Chems. Ltd v. Comm’n*, EUR-Lex CELEX 62007J0550, ¶ 119 (E.C.J. Sept. 14, 2010) (supremacy of EU supranational directives over conflicting national legal rules).

<sup>81</sup> EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR PRESS AND COMMUNICATION, KEY FACTS AND FIGURES ABOUT THE EUROPEAN UNION (2003), available at [http://ec.europa.eu/publications/booklets/eu\\_glance/44/en-1.pdf](http://ec.europa.eu/publications/booklets/eu_glance/44/en-1.pdf).

<sup>82</sup> Stephanie Bier, *The European Court of Justice and Member State Relations: A Constructivist Analysis of the European Legal Order* (May 2008) (unpublished paper) (presented at First Annual Graduate Student Conference on International Relations, May 14, 2008), available at <http://www.bsos.umd.edu/gvpt/irconf/papers/bier.pdf>.

E.U. Additionally, as the law in this area evolves, it remains to be seen just how broadly the reasoning of *Akzo* will be applied both at the national and the supra-national level. This evolution could have a particular significance for attorneys who practice internationally while licensed in states that do not view attorneys primarily as “collaborators in the administration of justice.”<sup>83</sup>

## II. PRACTICAL IMPLICATIONS FOR A SOUTH CAROLINA PRACTITIONER: FOREWARNED IS FOREARMED

### A. SUMMARY OF PRACTICAL IMPLICATIONS FOR A SOUTH CAROLINA PRACTITIONER

In light of the disparate treatment by E.U. privilege law of communications from lawyers who are and are not members of E.U. member state bars, and any in-house attorney, it should be clear that domestic practitioners must exercise a great deal of caution when working with international clients with exposure to E.U. jurisdiction. Domestic attorneys must be aware that the attorney-client privilege may not attach to communications that are accessible to the European Commission in an investigation. South Carolina attorneys must be aware that, because South Carolina courts have not addressed this conflict of laws question directly, the attorney-client privilege may be susceptible to attack even in a court of this state under certain conditions.

### B. WHAT KIND OF COMMUNICATION MIGHT BE INVOLVED?

Given that South Carolina law and stated public policy uphold the attorney-client privilege,<sup>84</sup> South Carolina in-house attorneys can operate safe in the knowledge that the legal advice that they provide to their employing corporations operating only in the U.S. will be protected by the privilege. However, what about advice to corporations that are not purely domestic?

Returning to the example given at the beginning of this note, suppose that a corporate entity operating in both South Carolina and Germany employs an attorney at the company’s South Carolina headquarters. The general counsel based in Munich, Germany, e-mails the South Carolina in-house attorney and seeks a legal opinion as a

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<sup>83</sup> Opinion of Att’y Gen. Kokott, Case C-550/07 P, *Akzo Nobel Chems. Ltd. v. Comm’n*, 2010 EUR-Lex CELEX 62007CC0550, ¶ 190 (Apr. 29, 2010).

<sup>84</sup> *Love*, 275 S.C. 55, 271 S.E.2d 110.



component of the development of a comprehensive strategy to increase global market share. (Compare this scenario to the situations in *A.M. & S.* and *Akzo*, where in each case major enterprises were the subject of anti-trust investigations by the European Commission.)<sup>85</sup> The South Carolina attorney replies in an email that contains the legal opinion and never questions whether the attorney-client privilege attached to the communication. A copy of the email is stored on the client's server in Munich and on the corporate counsel's computer.

C. *CROSS-BORDER COMMUNICATION UNDER E.U.-LEVEL LEGAL PROFESSIONAL PRIVILEGE LAW*

Under *Akzo*, there is no question that if the European Commission opened a competition investigation, and probably any other investigation, into the activities of the corporate client the Commission could rightfully demand a copy of the email.<sup>86</sup> The Commission might even seize the general counsel's computer or the entire server in a dawn raid, similar to the raid where the Commission seized the communications at issue in *Akzo*.<sup>87</sup>

D. *SOUTH CAROLINA COURTS AND LEGAL PROFESSIONAL PRIVILEGE*

How a South Carolina court would assess a challenged assertion of attorney-client privilege over a cross-border communication with a European client is an open question. At least, a court of this state probably would find that a communication seized in the course of a Commission investigation ceased to be confidential, and therefore the attorney-client privilege no longer applied.<sup>88</sup> Additionally, a litigant could challenge an assertion of privilege on the theory that E.U. privilege law controls the treatment of the communication.<sup>89</sup> Although presence in a South Carolina forum probably would dictate that South Carolina evidentiary rules applied, this scenario presents a conflict of laws question<sup>90</sup> that our courts have not yet answered. Finally, a litigant could assert that the confidentiality requirement of the privilege

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<sup>85</sup> See generally Case C-550/07 P, *Akzo Nobel Chems. Ltd v. Comm'n*, EUR-Lex CELEX 62007J0550, ¶ 119 (E.C.J. Sept. 14, 2010); see also Case 155/79, *Austl. Mining & Smelting Eur. Ltd. v. Comm'n*, 1982 E.C.R. 1575.

<sup>86</sup> *Akzo*, Case C-550/07 P, ¶¶ 120-22.

<sup>87</sup> *Id.* ¶ 3.2.

<sup>88</sup> 81 AM. JUR. 2D *Witnesses* § 362 (2011) ("the privilege evaporates the moment that confidentiality ceases to exist.").

<sup>89</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 (2011).

<sup>90</sup> See *infra* Part II.4-B (comparing the approaches of RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 597 (2011) and RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 (2011)).

was not met, and therefore the attorney-client privilege never attached.<sup>91</sup> None of these theories would necessarily succeed, but each of them could be asserted credibly.

#### 1. DESTRUCTION OF THE PRIVILEGE BY DISCLOSURE TO THE COMMISSION

First, a South Carolina court reasonably could find that a communication seized in the course of a Commission investigation ceased to be confidential, and, therefore, that the attorney-client privilege no longer applied. The South Carolina Supreme Court, in *State v. Love*, cited American Jurisprudence (Second) for its rule statement that in order for the privilege to exist, “it must be shown that the relationship between the parties was that of attorney and client and that the communications were of a confidential nature.”<sup>92</sup> American Jurisprudence 2d also states that, “the privilege evaporates the moment that confidentiality ceases to exist.”<sup>93</sup> A communication intentionally disclosed to the European Commission, even under legal compulsion, can no longer be considered confidential. Therefore, it follows that the attorney-client privilege evaporates at the time of the disclosure to the Commission.<sup>94</sup> Although a South Carolina court might seek a different result on other grounds, perhaps as a matter of public policy,<sup>95</sup> such a court could reasonably find that the attorney-client privilege no longer applied under these standards.

#### 2. CHALLENGING PRIVILEGE BASED ON E.U. LAW

Second, even if a cross-border communication has not been disclosed to the European Commission, the privileged nature of a communication still might reasonably be challenged under the theory that the law controlling any privilege over the communication is E.U.-level evidentiary privilege law and not the law of the local forum. This challenge would present a novel conflict of laws question for this state. However, South Carolina would probably adopt the approach dictating

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<sup>91</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 71 (2011) (describing confidentiality requirement as a prerequisite to attachment of the attorney-client privilege).

<sup>92</sup> *Love*, 275 S.C. at 59, 271 S.E.2d at 112 (citing 81 AM. JUR. 2D *Witnesses* § 221 (1980)).

<sup>93</sup> 81 AM. JUR. 2D *Witnesses* § 362 (2011).

<sup>94</sup> Cf. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 71 (2011) (describing confidentiality requirement as a prerequisite to attachment of the attorney-client privilege).

<sup>95</sup> *Love*, 275 S.C. at 59, 271 S.E.2d at 112. (quoting S.C. State Highway Dep’t v. Booker, 260 S.C. 245, 254, 195 S.E.2d 615, 619-20 (1973)).

that South Carolina law would control; but even if it did not, it still could uphold the privilege on policy grounds. Thus, E.U.-level evidentiary privilege law probably could not directly control the determination of the attachment of the attorney-client privilege in a South Carolina court.

Where a party challenges the admissibility of evidence based on the laws of another forum, the Restatement (First) of Conflict of Laws<sup>96</sup> and the Restatement (Second) of Conflict of Laws<sup>97</sup> set out two different approaches to this question that result in two different outcomes. The Restatement (First) of Conflict of Laws takes a strict territoriality approach to the question of the admissibility of evidence, stating simply that “[t]he law of the forum determines the admissibility of a particular piece of evidence.”<sup>98</sup> Nationally, this is now the minority view among states that either have considered the question or have signaled how they might approach the question.<sup>99</sup> Under the Restatement (First) approach, the attorney-client privilege is treated as procedural law. As such, a forum always applies its own local law. Under this approach, the law of the state court would control a challenge to the attorney-client privilege, rather than the legal professional privilege law of the E.U.

The Restatement (Second) of Conflict of Laws adopts the “most significant relationship test,”<sup>100</sup> which is the majority rule now among states, and classifies the attorney-client privilege as a substantive question.<sup>101</sup> The Restatement (Second) pronounces:

Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.<sup>102</sup>

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<sup>96</sup> RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 597 (2011).

<sup>97</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 (2011).

<sup>98</sup> RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 597 (2011).

<sup>99</sup> E. Todd Presnell & James A. Beakes, *The Application of Conflict of Laws to Evidentiary Privileges*, in EVIDENTIARY PRIVILEGES FOR CORPORATE COUNSEL 157, 162-67 (DRI, 2008), available at <http://www.mondaq.in/unitedstates/article.asp?articleid=66318>.

<sup>100</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(1) (1971).

<sup>101</sup> Presnell & Beakes, *supra* note 99.

<sup>102</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(1) (1971).

Under the Restatement (Second) approach, if an E.U. member-state had the “most significant relationship” with the communication, both the national law of the member state and E.U. legal professional privilege law logically would apply.

A hypothetical illustration may help clarify the two alternative approaches. Suppose that a litigant in South Carolina sought to discover and admit into evidence an email sent from the general counsel of Acme, S.A. to the president of the company. Both the general counsel and the president work in Paris, France. The email was sent and received under circumstances that would normally satisfy South Carolina standards for the attorney-client privilege to attach, but would not satisfy French and E.U. standards for the legal professional privilege to attach. The email was “carbon copied” to the general counsel of a branch office in South Carolina, and the local attorney responded to the discovery request by asserting that the communication was protected by the attorney-client privilege. Under the Restatement (First), a South Carolina court would apply the procedural law of the forum, which would mandate that the attorney-client privilege applied to the communication.<sup>103</sup> Conversely, French and the E.U. privilege law would apply, under the Restatement (Second) approach, because France and the E.U. would have the “most significant relationship” to the communication.<sup>104</sup> Under this analysis, the email would not be privileged unless its admission was contrary to a strong public policy of South Carolina.<sup>105</sup>

South Carolina has not decided which of the two conflicting approaches it would apply, and other states have decided the fundamental question in two different ways.<sup>106</sup> The Fourth Circuit in *Rawls Auto Auction Sales v. Dick Herriman Ford Inc.* predicted that South Carolina would likely follow the Restatement (First) approach of territoriality.<sup>107</sup> This prediction was confirmed by the South Carolina Supreme Court’s opinion in *Lister v. NationsBank* where the Court stated, “South Carolina has not adopted the modern choice of law test found in the Restatement [Second].”<sup>108</sup> Nonetheless, the Court immediately proceeded to “hold that if the Restatement [Second] test were applied . . . South Carolina is the place with the ‘most significant

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<sup>103</sup> RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 597 (2011).

<sup>104</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(1) (1971).

<sup>105</sup> *Id.*

<sup>106</sup> Presnell & Beakes, *supra* note 99.

<sup>107</sup> *Rawls Auto Auction Sales v. Dick Herriman Ford Inc.*, 690 F.2d 422, 427 (4th Cir. 1982).

<sup>108</sup> *Lister v. NationsBank*, 329 S.C. 133, 145, 494 S.E.2d 449, 456 (1997).

relationship' . . . ."<sup>109</sup> The *Lister* Court then engaged in a lengthy discussion applying the Restatement (Second) approach to the facts of the case.<sup>110</sup> This appears to leave the door open to the application of the Restatement (Second) in South Carolina. Furthermore, the South Carolina Rules of Civil Procedure contemplate that foreign law will control the substantive rulings of some proceedings, and the Rules give state courts the authority to determine and apply that law as required.<sup>111</sup>

Although South Carolina is a Restatement (First) state, the Supreme Court left the door open to the application of the Restatement (Second) in future cases. But three factors point toward a South Carolina court upholding the attorney-client privilege in the face of a challenge based on E.U. legal professional privilege law. First, the Fourth Circuit prediction that South Carolina likely would follow the Restatement (First) approach is probably correct. Second, even if South Carolina did elect to adopt the Restatement (Second) approach in a situation where a litigant challenged the privileged nature of a communication under the substantial relation test, admission of the communication would still "be contrary to the strong public policy of the forum."<sup>112</sup> South Carolina rules do contemplate that foreign law will control a state court's decision in at least some cases,<sup>113</sup> so it would be reasonable and proper for a South Carolina court to apply supranational E.U. law if it believed the situation so required. Also, national law of the E.U. member state may not recognize any privilege over the communication,<sup>114</sup> meaning that the privilege could similarly be challenged on the basis of national law independent of E.U.-level privilege law. But the stated policy of South Carolina favoring the attorney-client privilege nevertheless should trump application of a foreign law that does not recognize the privilege.<sup>115</sup>

Third, a party seeking disclosure of the privileged information would argue that the power of the Commission to legally demand production of the emailed communication in any investigation defeats reasonable expectation of privacy.<sup>116</sup> However, it would be difficult for

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 146-48, 494 S.E.2d at 456-57.

<sup>111</sup> S.C. R. Civ. P. 44(d).

<sup>112</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139 (2011).

<sup>113</sup> S.C. R. Civ. P. 44(d).

<sup>114</sup> See generally EDWARD, *supra* note 8; see also Council of the Bars and Law Societies of the European Union, *supra* note 8.

<sup>115</sup> *Love*, 275 S.C. at 59, 271 S.E.2d at 112.

<sup>116</sup> Case C-550/07 P, *Akzo Nobel Chems. Ltd v. Comm'n*, EUR-Lex CELEX 62007J0550, ¶ 119 (E.C.J. Sept. 14, 2010).

the typical non-governmental litigant, not having been given such authority, to challenge an assertion of attorney-client privilege in a South Carolina court on this theory alone.

### 3. CHALLENGING PRIVILEGE BASED ON SOUTH CAROLINA LAW

A third, and possibly more successful, challenge to attaching the attorney-client privilege to a cross-border communication with a client is that the “confidentiality” requirement of the attorney-client privilege in South Carolina could be defeated by the knowledge that the communication cannot be expected to remain confidential.

As stated in *State v. Love*, the attorney-client privilege attaches only to communications “of a confidential nature.”<sup>117</sup> Since confidentiality is a basic prerequisite under South Carolina law for the privilege to attach, a showing that the cross-border communication could never be confidential in a European Commission investigation might render it admissible. The Restatement (Third) of the Law Governing Lawyers § 71 supports this reasoning where it explains that confidentiality requires a reasonable belief “that no one will learn the contents of the communication except a privileged person . . . or another person with whom communications are protected under a similar privilege.”<sup>118</sup> *Akzo* confirmed that the European Commission has ready access on demand to communications to companies from their in-house attorneys; therefore, no such attorney can reasonably believe that their communications to these companies actually will be confidential as contemplated by the Restatement. Under this approach, the privilege never attached to the communication in the first place, and therefore the communication is not protected.

Of course, both the attorney and the corporate client in the example above intended the cross-border communication to be secret and confidential. The key to the success of this theory would be to convince a state court to distinguish between the *desire* that the information remain undiscovered and the *reasonable expectation* that the information remain undiscovered. Under the Restatement, a litigant would have a strong argument that the communication between the hypothetical lawyer and the client could not properly be considered confidential, because it could never be withheld from the European Commission in the course of an investigation. Given that this theory relies primarily upon South Carolina law for the substantive privilege

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<sup>117</sup> *Love*, 275 S.C. at 59, 271 S.E.2d at 112 (citing 81 AM. JUR. 2d *Witnesses* § 221 (1980)).

<sup>118</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 71 (2011).

rules and upon E.U.-level legal professional privilege law only for circumstantial facts and reasonable expectations, this theory has a serious chance of success in a South Carolina court.

But even given this chance of success, a South Carolina court probably still would find that the privilege applies to the communication. First, the average litigant in a South Carolina court does not have the broad power of seizure that the Commission has. Therefore, even if the Commission could seize the communication, this does not necessarily mean that anyone else could access the communication. Second, a South Carolina court probably would find that where the communications had not yet been seized, those documents had not yet been exposed to the public. Therefore, the confidentiality had not been destroyed. Finally, even where the documents had been seized, a South Carolina court could uphold the privilege based on the reasonable expectation that the communications would remain private at least in South Carolina fora.

#### 4. RESORT TO TREATIES: DEFERENCE TO LOCAL RULES

Treaties tend to preserve, rather than resolve, the conflicts inherent in the treatment of evidence in international law by deferring to local law. The most significant treaty on international evidence rules, the Hague Convention, focuses on the acquisition of evidence across international borders.<sup>119</sup> The Convention remains silent on the treatment of evidence and the preservation of any privileges once that evidence is in international legal fora.<sup>120</sup> Insofar as the Convention does address evidentiary privileges, it is only to require that international requests for evidence be executed in compliance with local rules.<sup>121</sup> Practically speaking, this means that the attorney-client privilege would be protected in international discovery requests. All other conflicts of law issues are left to local fora.

#### *E. PRACTICAL IMPLICATIONS AND PROBLEM SOLVING: WHAT THIS MEANS FOR SOUTH CAROLINA ATTORNEYS WITH INTERNATIONAL EXPOSURE*

In light of *Akzo* and its implications, in-house attorneys that advise corporate clients with E.U. exposure must exercise a heightened level of caution in terms of confidentiality. Also, these practitioners

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<sup>119</sup> Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters art. 9, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

must be prepared to defend the attorney-client privilege in a court of this state based not just on the black-letter requirements of attachment, but also based upon the public policy of this state favoring the privilege.<sup>122</sup>

First, practitioners should not assume that evidentiary privileges would attach to their communications to and from clients in E.U. member states, even if an identical communication with a domestic client would be privileged. Domestic practitioners in situations where such communication is required may wish to coordinate with and communicate through local outside counsel licensed to practice law in a E.U. member state. While this is often an expensive and cumbersome process for both the client and the domestic attorney, it appears to be the only safe way to ensure that cross-border communication will be truly privileged.

Once more, a hypothetical illustration may help clarify by returning to the example of a corporate client, operating in both South Carolina and at least one E.U. member state, which employs an attorney at the company's South Carolina headquarters. The general counsel based in Munich, Germany, emails the South Carolina in-house attorney and seeks a legal opinion as a component of the development of a comprehensive strategy to increase global market share. Under these circumstances, the wisest course of action would be to retain outside counsel who is licensed to practice law in a jurisdiction of the E.U.<sup>123</sup> If this is not a viable option, the next best course of action is to have a phone conversation to relay the answer, rather than transmitting a written document into a jurisdiction where it will not be privileged from seizure and use in an investigation.

Next, practitioners must be prepared to defend the attorney-client privilege in a court of this state based on the public policy of this state favoring the privilege.<sup>124</sup> Because civil law systems do not engage in the type and degree of discovery practice of common-law systems, it is unlikely that a South Carolina attorney will be faced with a discovery

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<sup>122</sup> *Love*, 275 S.C. at 59, 271 S.E.2d at 112.

<sup>123</sup> Opinion of Att'y Gen. Kokott, Case C-550/07 P, *Akzo Nobel Chems. Ltd. v. Comm'n*, 2010 EUR-Lex CELEX 62007CC0550 (Apr. 29, 2010) (rejecting the argument that the legal professional privilege should extend to communications with attorneys not licensed to practice in an EU member state); *see also* Case C-550/07 P, *Akzo Nobel Chems. Ltd. v. Comm'n*, EUR-Lex CELEX 62007J0550, ¶¶ 45, 57, 119 (E.C.J. Sept. 14, 2010) (affirming the opinion of AG Kokott in framing and interpreting the issues generally, though not on this specific point, in references throughout the opinion).

<sup>124</sup> *Love*, 275 S.C. at 59, 271 S.E.2d at 112.



request from a party in the E.U. But a creative and well-informed party seeking discovery in this state, or operating in a South Carolina court, could reasonably attack the privilege on the theory that the privilege over certain documents had been destroyed when the European Commission seized them;<sup>125</sup> that foreign and not domestic privilege laws controlled any privilege determination;<sup>126</sup> or that the privilege never attached to the documents because of the possibility of disclosure.<sup>127</sup> Of course, the black-letter law arguments in each case would vary based upon the facts and circumstances of each determination. But in each case, it would be important to note to the court the strong policy in this state in favor of the privilege;<sup>128</sup> especially in those cases where the court would be called upon to elect between multiple frameworks for analyzing an assertion of privilege.

In sum, the most important thing is for domestic practitioners with European clients to be aware of their limitations so that they can proceed with a heightened sense of caution and awareness in order to avoid disclosure of communications that were intended to be confidential, and to defend the privilege from attack based on policy grounds when faced with a potential conflict of black-letter rules.

### III. CONCLUSION

Returning to the hypothetical South Carolina attorney described earlier, she must be aware that European supra-national law does not mirror South Carolina's attorney-client privilege, and may not extend evidentiary privileges to communications between the attorney and the client in Europe. The holding, in *Akzo*, presents significant challenges for domestic in-house attorneys. Furthermore, the language of AG Kokott's opinion implying that any communications from persons who are not members of E.U.-member state bars to a corporation would not be protected should concern even outside counsel advising international clients. These challenges have the potential to blindside attorneys who assume that similar evidentiary privileges will always attach to their communications, no matter where they go. Of course, once the limitations imposed by E.U. legal professional privilege law are made clear, the attorney may advise the client of the potential pitfalls, bring in outside counsel where required, and generally act with discretion to

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<sup>125</sup> See *supra* Part II.4-A.

<sup>126</sup> See *supra* Part II.4-B.

<sup>127</sup> See *supra* Part II.4-C.

<sup>128</sup> *Love*, 275 S.C. at 59, 271 S.E.2d at 112.

ensure that communications remain as confidential as they were intended to be.